Campbell, General, Pursuer

CAMPBELL v. BLACK.

REPORT

OF THE

CASE DECIDED IN THE HOUSE OF LORDS,

On the 16th of May 1817,

IN WHICH

GENERAL CAMPBELL OF *MONZIE* WAS PURSUER,

AND

DAVID BLACK, ESQ. DEFENDER.

EDINBURGH:

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132. HIGH-STREET.

1817.

INTRODUCTION.

THERE are three reasons why it has been thought right to publish the following case.—

1*st*, If the decision of the House of Lords does not absolutely fix, the discussions both there and in the Court of Session, at least materially affect, a principle of official conduct, which it is important for all returning officers, and those connected with them in election business, to know.

2*dly*, Enough is stated, and with sufficient plainness, in the Petition and Complaint, to make it evident, that this prosecution was brought under the auspices, and from the spirit, of party. It is not only a gratification, but a sacred duty, to add another to the long list of our judicial triumphs, by pointing out how signally those considerations failed before the high and independent impartiality of the Courts of law; for though the Judges differed upon the abstract legal question, there was an almost unanimous sentiment with respect to the spirit that had given rise to its discussion.

3*dly*, Even if the complaint had been confined strictly and correctly to the precise statutory of-

fence with which Mr Black was meant to be charged, that gentleman would have had a right to make his defence as generally known as the accusation. But the challenge seems to us to have been extended to his whole personal and political character, and his interest is lost amidst the common interest which we all have, in being assured that no man can be penally prosecuted "*upon loose pretences,*" and that the introduction of such topics into a grave criminal charge is neither relevant nor decent.

For the accuracy of the Report, we can appeal with confidence to the sources from which it has been taken. The statements and arguments of the parties have been extracted from their printed pleadings. The opinions of the Judges in the Court of Session have been taken from notes made up as usual *at the time* by those engaged in the case, and these notes were referred to as correct by the Lord Chancellor himself. The opinions expressed by that Judge *in the course of the pleadings* in the House of Lords, have been furnished under the handwriting of one of the Counsel who heard them; and all that was afterwards stated by his Lordship and Lord Redesdale has come to us regularly certified by Mr Gurney, the short-hand writer.

REPORT

IN THE CASE

CAMPBELL *v.* BLACK.

FACTS OF THE CASE.

DAVID BLACK, Esq. of Bandrum, was Town-clerk of the burgh of Inverkeithing in the year 1812, and held that situation for several years before. It is the duty of town-clerks to make out the returns in favour of the delegates chosen by their respective burghs, to vote for a Member to represent the districts, into which all Scotch burghs are classed, in Parliament.

The Legislature has made various provisions, in order to prevent or punish partiality in any part of the proceedings by which the election of Members of Parliament may be affected. One of these is, (16. Geo. II. cap. 11. § 26.) that "at every election of Commissioners for choosing burgesses for any district of burghs in that part of Great Britain called Scotland, the common-clerk of each burgh within the said district, shall make out a commis-

sion to the person *chosen by the major part* of the Magistrates and Town-Council assembled for that purpose;" and if he shall not do so, "or if he shall make out and sign a commission to any other person, who is *not chosen by the majority*," it is declared, that "he shall, for every such offence, forfeit the sum of L.500 Sterling *to the person elected Commissioner* for the said burgh as aforesaid, to be recovered by him or his executors, in the manner herein after directed, and shall also suffer imprisonment for the space of six kalendar months, and be for ever after disabled to hold or enjoy the said office of common-clerk of the said burgh, as effectually as if he was naturally dead."

In almost all burghs, the Magistrates and Councillors are elected *annually;* their names are inserted in a regular roll; and being once elected, and not complained of within two months, they continue in office until they are regularly and periodically changed, when the alteration is again recorded in a document, to which the returning officer can always refer as decisive of their qualification. This system prevails so very generally, that Wight declares, (p. 333, 334.) that "*All* burghs stand on the same footing in this respect, *that the Magistrates and Councillors must be annually elected.*"

Inverkeithing, however, forms an exception to this general rule. By the constitution or sett of this burgh, "the Council consists of fifteen persons *at least*, viz. the Provost, two Baillies, the Dean of Guild and Treasurer, and ten *or more* in-

habitant burgesses. They proceed in their election thus:—Upon the 29th September yearly, the Magistrates and old Council met in the forenoon within the tolbooth, and when those of the old Council who are desirous of an ease have demitted their offices, they choose as many new Councillors in their room to keep up the number." So that, in the *first* place, though there be an annual election of the *Magistrates*, there is no annual election of the *whole Council*, the members of which, when once chosen, continue for life, unless they become disqualified, or choose to demit. In the *second* place, though the sett prescribes fifteen at least as the minimum, it fixes no maximum; but, on the contrary, declares, that the common Councillors may be "ten *or more* burgesses." In the *third* place, one of the qualifications required for a Councillor is *residence*. There must be "ten or more *inhabitant* burgesses." In the *fourth* place, there is nothing in this burgh equivalent to what is generally, though inaccurately, termed a roll in other places; that is, there is no one specific paper, by simply looking at which, the clerk can inform himself positively who the Councillors are.

The peculiarities of this constitution have always been recognized, both by the practice of the burgh and by the Court of Session. In one case* it was found, "that by the sett of this burgh, Councillors behoved to be *resident* burgesses;" and Lord Elchies, who reports it, adds, that "all the Coun-

* Elchies' Reports, No. 22. *voce* Burgh Royal.

cillors here are *for life.*" In another case* it was determined, that in a complaint against an election in this burgh, it was not necessary to call a person of the name of Cuningham as a defender, because, as he had ceased to reside within the burgh, he *ipso facto* lost what would otherwise have been his rights as a Councillor.

Captain John Montgomery was elected a Councillor in the year 1799, and Mr John Gulland in the year 1806; and of course, whether it were the fact or no, as their eligibility was not objected to, it must be held, that they were both resident when they were appointed. But Captain Montgomery was objected to at an election which took place in 1806, on the ground, that he had *at that time* no residence within the burgh; and the Court of Session "sustained the objections made by the complainers against the election or continuation of the respondent, *Captain John Montgomery,*" &c. A petition was given in against this judgment, but nothing more was ever done in the action; so that the existing interlocutor was one by which that Councillor had been found then disqualified. A similar complaint was made at the same time against Mr Gulland; but the fact of his non-residence being disputed, a condescendence was ordered, with a view to inquiry. The proceedings against him, however, were also dropped, and no investigation took place. These complaints, in whatever manner they might have terminated, would not

* Young v. Johnston, January 1766.

have *permanently* fixed the right of the two gentlemen to vote, for their qualification by inhabitancy might have been afterwards lost and regained, or *vice versa*, according to circumstances; but they show that residence has uniformly been deemed an essential ingredient of the right, and one on which *judgment* was exercised by the Court whenever there was any dispute on the subject. Indeed, these two individuals did actually vote at several meetings, *after* the date of the proceedings that have been mentioned. But few, if any of these were meetings for chusing a delegate, or when the clerk had a statutory ministerial office to discharge, but only meetings at which he was the servant of those assembled. At every one of them, besides, there was a clear and decided majority of *undisputed* votes, so that the clerk was not called upon even to take notice of the objections, because his duty was plain independently of them.

At the general election of 1812, there was a keen contest for the representation of the district of Burghs to which Inverkeithing belongs, between General Maitland and General Campbell of Monzie. Mr Black had no vote; and his only legal concern with the matter was, that, as Town-clerk, he was obliged to make a return.

The Council assembled, in order to chuse a delegate, on the 15th of October 1812. Twenty-seven persons, among whom was General Campbell, appeared, and claimed, or seemed by their attendance to claim, a right to vote. *Of these Captain John Montgomery and Mr Gulland were two.* The

names of the whole were taken down at the beginning of the meeting by Mr Black, as "*present.*"

This was no sooner done than *both* parties stated objections to Councillors, and required the Clerk to reject the votes of these persons, if they should be tendered. Sir John Henderson, who was in the interest of General Maitland, objected to four persons, two of whom were Montgomery and Gulland. The objection was thus stated: "Sir John Henderson protested against the votes of Duncan Montgomery and *John Montgomery* being received by the Clerk, on account of the decision of the Court of Session, finding, that they had no right to be Councillors, and ordering their names to be struck off the list of Councillors; and he called on the Clerk, *as he should answer at his highest peril,* not to call their names, and to strike them off the list of Councillors; and he further protested against the Clerk receiving the vote of Alexander Montgomery, on account of his non-residence, and the vote of *John Gulland,* on account of his non-residence, and not being a burgess; and he protested against the Clerk receiving their votes." On the other hand, General Campbell challenged four other individuals, and "protested (as the minutes bear) that the *names of the said parties shall be erased from the list,* and if received, they shall be null and void."

The two officers, whose business it was to summon the Council, were then called in, and they swore that they had summoned both Gulland and Montgomery; but they added, that they had served

the summons on Mr Gulland at his "house at Bellknows," and on Montgomery "at the distillery." It was admitted on all hands, that neither of these two places were within the burgh, and that Captain Montgomery's general residence was at Chatham.

Mr Black being thus called upon by *both* parties to exercise his own judgment in receiving or rejecting votes, was reduced to a situation of difficulty, which he thus recorded at the time in the minutes. "Which protest, answer, reply, and duply, having been considered by the Clerk, he finds, that no evidence of the alleged decree of the Court of Session has been produced sufficient to authorize him to strike off the names of Mr Duncan Montgomery and Mr Alexander Montgomery from the Council roll. He is, however, decidedly of opinion, that the objections stated against the votes of Captain John Montgomery and Mr John Gulland, founded on their non-residence within the burgh, (which is a circumstance of notoriety, and consistent with his own private knowledge), is a good objection, and that they are not legal Councillors of this burgh. He would therefore have no hesitation in setting aside both their votes, *if it was clearly competent to him to determine that matter;* but not being satisfied that it is his duty, as returning officer, to judge of the validity of the votes which may be tendered to him upon the present occasion, he resolves not to call for, *but to mark the votes* which may be tendered under protest by Captain John Montgomery and Mr Gulland, *reserving for*

consideration, when he shall decide in whose favour the commission is to be made out, the legal effect of such votes, and whether or not the same ought to be received; *declaring, that notwithstanding his own conviction of the real invalidity of any votes to be tendered by Captain Montgomery or Mr Gulland, he shall reckon them, before making out a commission in favour of a delegate, or if, after due consideration* AND ADVICE, *he shall find that it is not strictly competent to him, as Clerk of the burgh, to decide the question of their legality or illegality, and to reject them accordingly.*"

The votes were then called; and the result was, that of twenty-five persons, whom Mr Black considered himself warranted to acknowledge as members of the Council, thirteen voted for General Maitland, and twelve for General Campbell. But, in addition to these twelve, Captain Montgomery and Mr Gulland tendered their votes for General Campbell; and these votes, though not originally called for or taken, were received and marked, in order that they might be counted, if it should be afterwards ascertained that they were valid. General Campbell having, as Provost, a casting vote, in case of equality, declared, that if that event should occur, he gave his vote in his own favour. It is obvious, however, that his having an opportunity of doing so, depended entirely on what was done with the votes of Gulland and Montgomery, because if they should be rejected, then there would be a majority in favour of General Maitland.

Mr Black had stated, as has been seen in the minutes, that he was to take *advice* with respect to these matters. Accordingly, whenever the meeting was over, he intimated to both parties that he intended to consult Mr Adam,* who had had more experience in Scotch election cases than any other man in the kingdom, and was understood to be eminently skilled in the theory and practice of election law in general, and invited them to accompany him. This was declined by those who acted for General Maitland; and, therefore, Mr Black went alone, 100 miles off, to the county of Kincardine, where Mr Adam was. He stated the point at issue to him in a memorial, in the following terms:—

"The memorialist, who holds the office of Common-Clerk of the Royal Burgh of Inverkeithing, acted as such at a meeting of the Town-Council, held on the 15th instant, for the election of a delegate to chuse a Member of Parliament. And being called upon by opposite parties, in consequence of the procedure which then took place, to make out a commission immediately in favour of two different candidates, each claiming to be the legal delegate, he found it difficult, and in the peculiar and (as far as he knows) *unprecedented* circumstances of the case, to decide in whose favour he ought, in the most impartial exercise of his duty, to make out the commission, with safety to himself; at same time, not desiring to shrink

* Now Lord Chief Commissioner of the Jury Court.

from such fair and proper responsibility as may be due to either of the candidates. He therefore requests the opinion and advice of Mr Adam, there being no other lawyer in whom the memorialist can place so much confidence, on the present occasion, not only on account of Mr Adam's legal and parliamentary knowledge and experience, but more especially from the conviction that Mr Adam's personal regard for the memorialist (whose character is of infinitely greater importance than any seat in Parliament can be,) will induce him to consider the points attentively, and advise the memorialist to do what is most consistent with his own honour, *and the strict discharge of his duty*. The memorialist begs to refer Mr Adam to THE ORIGINAL MINUTES OF ELECTION, and to the several statutes relating to elections in Scotland, particularly to statute 16. Geo. II. cap. 11. all of which accompany this case."

To this the following answer was returned: "I have perused the minutes and statutes to which this case refers, with great care, and have given the question my most deliberate consideration. The result is, that I entertain no doubt as to the Common-Clerk of a burgh, as a returning officer generally, and under the provision of the 16th Geo. II. § 20. and the oath prescribed by that statute, *being bound* to exercise his judgment as to the qualification of the Magistrates and Councillors who present themselves to elect a delegate; and that he must return the person who, *according to the best of his honest judgment*, has the majority

of Magistrates and Councillors present, *legally* qualified.

"*First*, Every returning officer, though in the eye of the law a ministerial officer, is bound to discharge his ministerial function, by exercising a sound and honest judgment in the qualification of electors tendering their votes. This is universal throughout the nation.

"*Secondly*, There is nothing in the case of the Common-Clerk of a Scottish burgh acting as the returning officer of a delegate, to vary this duty from the ordinary case of a returning officer; but, on the contrary, this is rendered more manifestly his duty, by the destination which the statute of the 16th Geo. II. creates, by the oath which it prescribes to the Common-Clerk of a burgh in the election of the Member of Parliament by the delegates. By the first oath, he is bound to make out a commission to the Commissioner who shall be chosen by the majority of the Town-Council assembled, and to no other person. By the second, he is to return the person elected by the major part of the Commissioners assembled, "whose commissions are authenticated by the subscription of the Common-Clerk, and common seal of the respective burghs."

"By the first he is bound to form his judgment as to the majority of the Town-Council assembled; meaning undoubtedly the majority of those entitled by law to the franchise on which they claim to vote. By the second, he can look no further

than the instrument which limits his judgment to the authenticity of the subscription and seal.

" The exercise of judgment in a ministerial officer is incident to all acts done by such an officer, the extent and nature of the judgment he is called upon to exercise varying necessarily with the act he has to perform. In a returning officer, where not regulated and restricted by statute, (as in the case of a Common-Clerk at the election of Member), but left at large, (as in the case of a Common-Clerk at the election of delegate), he is *bound* soundly and impartially to take care that he does not throw the burden of establishing the right upon those who ought not to bear it, and relieve those who ought to bear it. . . . . .

" To apply those rules and principles to the present case, it may be proper to state,

" *First*, That *both* parties, and Mr Black himself, acted upon the supposition that judgment was incident to the duty of Common-Clerk; and it appears to me, that if any party had done otherwise, they would have acted in violation of an universal rule, and universal usage, resulting from the very nature of the office of returning officer.

" *Secondly*, It appears to me, that Mr Black, in declining to enumerate the votes of Captain Montgomery and Mr Gulland, *has formed a correct judgment* as to the sett of the burgh, and that he has conformed to a judgment of the Supreme Court upon the point, which is his best and surest guide. Against this existing judgment, the argument of parties, as to the possible or probable

effect of a reclaiming petition, is not to be listened to.

" His anxiety is just and natural; and when there is time for a person discharging such duties, to have a deliberate opinion on the point, he is justified, notwithstanding his own opinion evinced by his acts, to suspend his decision. But if the case, on due and impartial consideration, is clear, and if it is conformable to an existing decree of a Supreme Court, it would involve him in most serious difficulties, if he were to act against his declared opinion, established by his deliberate act, at the election. To follow them up, and to grant a commission of delegate to General Maitland, as having the majority of legal *bona fide* Councillors, ought not to involve him in any difficulty; *and I consider him as bound by his oath, and according to the impartial exercise of his trust, to incur the responsibility incident to his making out a commission in favour of General Maitland.*"

Mr Black having the tendency of his own opinion thus confirmed, made out the return in favour of General Maitland. General Campbell, however, got the votes of a majority of the Burghs, and sat as Member for the district.

Notwithstanding this, he, with the concurrence of " Archibald Colquhoun, his Majesty's Advocate, for his Majesty's interest," presented a petition and complaint against Mr Black to the Court of Session. This complaint, which was the foundation of all the subsequent proceedings, set out by reciting certain clauses from the 16th of Geo. II. cap.

11. particularly those which enjoin the clerk of all burghs to return the delegate who is chosen by the majority, and to take an oath that he will do so. The penalties of his neglecting this part of his duty are then mentioned, and it is added, " These sure but necessary penalties, thus enacted by the Legislature against the partiality, fraud, and malversation of the Common-Clerks of burghs in matters of election, have hitherto in general been found sufficient to achieve the objects for which they were intended. And it was to have been expected, that the example which was recently made by your Lordships of the Town-Clerk of Queensferry, who was convicted of having violated the provisions of the statute, and punished accordingly, would have operated in deterring others from subjecting themselves to a similar fate. But in the late election of a delegate for the Burgh of Inverkeithing, a striking example has been afforded of a public officer, who, disregarding alike the provisions of the statute, and the solemn warning given by your Lordships in the case of Queensferry, *and who, totally unrestrained by the obligation of his oath, the fear of disgrace, and of condign punishment, has, after mature consideration, and with his eyes open, incurred the whole penalties of the law, and subjected himself, over and above, to a criminal prosecution, and the consequences of deliberate perjury. The misguided and the guilty individual who has thus had the audacity and wickedness to expose himself to the vengeance of the law, is David Black, Town-Clerk of Inverkeithing.* And against him the complainer, *impelled by a sense of*

the duty which he owes to himself, to the community of which he is a member, to the independent Burghs which he has the honour to represent in Parliament, and to the public at large, now calls upon your Lordships to award to the fullest extent the penalties of the statute."

A statement is then given of what General Campbell held to be the facts of the case, and this statement begins as follows: "In order that your Lordships may be able fully to appreciate the *motives* which could have induced an individual person to pursue a line of conduct which *must* be attended with consequences so fatal to his fortune and his reputation, it is proper to mention, that at the late general election there were two candidates for representing in Parliament that district of Burghs to which Inverkeithing belongs, viz. the Honourable Lieutenant-General Thomas Maitland, and the complainer. The former of these was supported in his canvass *by those partizans in the vicinity of Inverkeithing, and by other individuals of greater note, whose predilections, it is notorious, accorded with those political sentiments which the said David Black has continually and openly avowed.*"

After explaining the state of the vote, it is added, (Pet. p. 4.) that "fourteen members of the Council, however, remained steady in the interest of the complainer; and hence it was obvious that the whole enterprise, upon the part of the General, must prove abortive, unless, by *open force* or *secret fraud*, the legal majority should be deprived of its due influence in the approaching election. From the

eruptions which were, during the canvass, frequently observed to be made from the coal-pits in the neighbourhood, by a class of men, whose services upon such adventures your Lordships are not to be informed, had more than once been resorted to, apprehensions were entertained that the contest was to be decided by those friends to the freedom of election. But the recollection of what such an appeal to the bowels of the earth had formerly cost some of the individuals at present engaged, seems to have prevented a repetition of that controlling and decisive argument. The latter mode of warfare was accordingly at length resolved on, which, although attended with less danger, both to the purses and the persons *of the leaders*, was, in its result, equally powerful. Fortunately for the success of their measure, they had an ally who had both the means and the inclination to serve them. This was no other than the said David Black, whom the result has proved to have been a willing and ready tool, *prepared to go all lengths*, in advancing the views of those who had thus determined to avail themselves of his assistance."

After some further statement, the complainer's title and object is thus stated: "In this situation, the complainer, deprived as he has been of the right which he had acquired by the election in his favour, by the major part of "the Magistrates and Town-council assembled," to be their Commissioner to vote in the election of a Member of Parliament, by the *criminal* measures resorted to by this individual, now calls upon your Lordships to

vindicate the law, by inflicting upon him the punishment which it has provided for persons in the situation which he holds, who, setting its provisions at defiance, call down upon their own head the *infamy* which he has incurred. That your Lordships are bound to comply with this requisition, and to award against David Black to the fullest extent the statutory penalties, *is beyond the possibility of doubt.*"

The precise legal object of the complaint is then announced; and this merely resolves into the allegation, that Mr Black had not, as in duty bound, returned the delegate chosen by the majority, because he had disallowed the votes of Captain Montgomery and Mr Gulland; and the petition closes with the following prayer: "May it therefore please your Lordships to grant warrant for serving this complaint upon the said David Black, and to ordain him to give in answers thereto within thirty days after such service; and, upon advising this complaint, with or without answers, to find that he has forfeited the sum of L.500 Sterling, and to decern him to make payment thereof to the complainer; as also to order the said David Black to be imprisoned for the space of six kalendar months, and to declare him for ever after disabled to hold or enjoy the office of Common-Clerk of the burgh of Inverkeithing, as if he were naturally dead; and to find the said David Black liable in the full expenses of this complaint; *and* to grant to the complainer such *other* relief as to your Lordships shall seem meet."

A very full discussion then took place before the Court. The petition was followed by answers, replies and duplies. The case having then been decided in the Court of Session against Mr Black, he gave in a reclaiming petition, which was ordered to be answered; and the interlocutor having been adhered to, he appealed to the House of Lords, where the whole matters in dispute were again discussed in very elaborate printed cases and full verbal pleadings.

Argument of General Campbell.

The argument for General Campbell, the complainer, was as follows:—

By the law of Scotland, clerks of burghs, when they act as returning officers, act only *ministerially*, and are not entitled to exercise any *judicial* power with respect to the validity of Councillors' rights. There no doubt *was* a time in which considerable discretion was lodged in the officer, but this was found to lead to great abuses, and the progress and perfection of the system has been to reduce him to the condition of a mere marker of votes. Thus, by the first statute which was passed in order to regulate these matters, (2. Geo. II. cap. 24.) the oath prescribed to the clerk is,—"I, A B, do solemnly swear, that I will return such person or persons as shall, to the *best of my judgment, appear to me* to have the majority of *legal* votes." And the penalty of L.50 is only inflicted for "every *wilful* offence contrary to this Act." By the next Act,

(7. Geo. II. cap. 16.) the penalty was raised to L.500; but this was only for a punishment to those clerks, either of shires or burghs, who shall "*wilfully* return any person other than him who shall be *duly* elected." But these provisions were soon discovered to be utterly defective; for a clerk, when prosecuted, had only to plead, that he had acted according to the best of his judgment, and that therefore his misconduct was at least not wilful; and thus no conviction could be obtained, unless gross and deliberate fraud were averred, and this averment established by clearer evidence than what can ever be expected of any thing that passed in the mind.

Hence the existing statute of the 16th of Geo. II. cap. 11. passed; an Act which forms the code of Scottish election law, and has foreseen, and prevented, or redressed, by plain and practical remedies, every abuse that can occur. Its preamble sets forth, that returning officers had often acted "*in a most partial and arbitrary manner.*" To remedy this and other evils, it establishes a complete system of directions and checks, applicable, 1*st*, To the election of Magistrates and Councils; 2*dly*, To the election of delegates; and, 3*dly*, To the election of Members for burghs and shires;—which are the three important stages in the appointment of a representative. It applies to *every* burgh in Scotland without exception, and this not unguardedly, but with a special view to their different setts, to which indeed the 22d section expressly refers. Now, in the 20th section of this

statute, which enjoins clerks to make returns, and in the section prescribing the oath to be taken by them, and in every other part of the Act, the words, "to the best of my judgment,"—"wilful," —"duly," and all other ambiguous expressions of the kind, are cautiously omitted; and the officer is ordained to return the person chosen *by the major part of the Magistrates and Councillors assembled for that purpose,*" and, *e converso, not* to make out a commission in favour of any other person.

The rule thus suggested by experience of the inadequacy of all others, is at once plain, positive, and universal; and has, ever since the date of the statute, been acted upon without any inconvenience being discovered, or even alleged, except by those who had improper designs in view. It is indeed precisely analogous to the principle that prevails in the only two other political elections which we have in this part of the kingdom, namely, at the elections of Knights to serve for the shires, and of the Noblemen who represent the peerage: in the former of which the Sheriff looks merely to the roll of freeholders, and in the latter the Clerk of Session opens the Union roll, and calls the names standing there, and marks how each individual votes. It is perfectly certain, that names stand on all the rolls of burghs, and of counties, and perhaps on that of the peerage, which ought not to be there; but the legal remedy for this is, for a competent party to complain to the Court of Session in the manner prescribed by the statutes, and to get them regularly struck off. To allow the

clerks to do so, or to discuss the votes in adjusting the return, is so illegal and dangerous, that no instance can be exhibited in which such a power was ever even claimed, except by Mr Black.

This being the general rule of law, it is the defender's business to shew why it should *not* be applied to him; and hence his defence necessarily resolves into this, that he was placed in a situation which formed an *exception* to the strict and ordinary legal principle. The grounds of this exception are as follows:—

First, The first is founded on an alleged peculiarity of the sett of the burgh, by which the number of Councillors is unlimited, they are not annually renewed, and inhabitancy is an ingredient of the right to vote; and hence it is pretended that he was entitled to exercise his private judgment, in determining both the fact and the necessity of residence. To this, however, there are various answers.

1*st,* It is not clear that the sett requires residence; voters have been recognized in practice without this, and the cases referred to do not establish that it is an indispensable qualification. The decision reported by Elchies (22. Burgh Royal, 29th January 1761,) is too shortly stated to be received as an authority, and Haldane's case was determined on a principle not applicable to the present question.

2*dly,* Although it were to be conceded that residence was indispensable, there is no ground for maintaining that a Councillor, being once admitted,

loses his qualification merely by ceasing to live within the burgh, or that the clerk can, of his own accord, strike him off. It is impossible to pretend, that the law which requires all Councillors who are objected to, to be regularly complained of to the Court of Session within two months, does not apply to Inverkeithing, as it confessedly does to every burgh in Scotland. The difference of the sett, in short, is imaginary; and, at any rate, the clerk is not the guardian of the sett.

Second, It is next stated by the defender, that owing to the peculiar constitution of the burgh, the statutory arrangement for expunging the name of a Councillor from the roll, who becomes disqualified by non-residence, cannot possibly be complied with, partly because there is in reality no roll, and partly because the qualification is lost *ipso facto* during all the time the non-residence lasts. The answer to this is,—

1*st*, That even assuming the necessity of residence, it is contrary to all the principles of law to hold, that the nullity of the qualification arising from this circumstance could be *declared* by the fiat of the Town-clerk. No nullities can be recognized without a regular action of declarator.

2dly, That the power thus arrogated is inconsistent with the words of the statute, and the evident justice of the case. By the statute, the clerk is to return the person elected by the majority of Councillors and Magistrates *assembled for that purpose;* and who those persons are, can never be the subject of serious doubt; for they are manifestly

those whose names are in the Councillors' roll, as previously chosen by the electors of the Councillors. And the justice of the case requires, that the clerk should look merely at those who stand recorded as Councillors *de facto*, though in his private opinion they may not be so *de jure*.

Third, It has next been maintained by the defender, as a ground of exception, that he acted *bona fide*. This, however, is neither relevant nor true.

1*st*, It is not *relevant*; because he was not only not obliged, but not entitled, to reckon the majority *according to the best of his judgment*, but was bound, and had sworn, to make out the commission in favour of the person chosen by the majority of the Town-council then assembled. And it is a general rule, that when a returning officer departs from his ministerial duty, *bona fides* is no legal defence. (Case of Gordon *against* Forbes in 1768.)

2*dly*, It is *not true*; on the contrary, it is palpable that he acted *in pessima fide*, merely for the sake of favouring a political party to which he was attached.

The *first* circumstance referred to in evidence of his *bona fides* is, that there was a subsisting judgment of the Court of Session in 1807, by which Captain James Montgomery was struck off the roll, and an investigation ordered with respect to Mr Gulland. But he knew perfectly well, that the investigation had never been gone into; that the judgment against Montgomery had been petition-

ed against; and that *both of these persons had been admitted to vote at a variety of meetings after the date of the complaint against them.* Captain Montgomery voted at a Council meeting in 1807, at the election of a delegate in the same year, at an annual election in 1808, and at another annual election in 1810. Mr Gulland had voted once in 1808, twice in 1809, once in 1810, and twice in 1811. The votes of both these gentlemen were marked upon all of these occasions in the minutes kept by Mr Black himself.

The *second* great evidence of *bona fides* was, that the non-residence of Messrs Montgomery and Gulland was not only notorious, and consistent with the private knowledge of the Clerk, but was proved by witnesses upon oath at the meeting. These, however, are not circumstances which even tend to evince the purity of Mr Black's views; for the question is not, Whether these persons were *inhabitant* burgesses? but, Whether, supposing them not to be so, Mr Black was entitled to strike them off at his own discretion? which is denied.

It is strongly urged, in the *third* place, that he shewed the fairness of his views by taking and acting upon the opinion of Mr Adam. Counsel, however, are not invested with any privilege which enables them to save those who act under their directions from the legal consequences of their conduct. Besides, it was going out of the way for Mr Black to leave all the Scotch Counsel at Edinburgh behind him, and to search for an Eng-

lish lawyer. The case, too, that was laid before this foreign practitioner was unfair; for it concealed the important fact, that subsequent to the date of the judgments of the Court of Session, which are mentioned in the opinion, both Montgomery and Gulland had been repeatedly recognized as Councillors by Mr Black himself.

But the best refutation of every pretence of *bona fides* is to be found in the conduct adopted by the defender, at a season in which he was not tempted to swerve from the line of his duty, by the interests of his party. In November 1806, the Council met to chuse a delegate. On this occasion, Mr Bonthron, a Councillor in *opposition* to the side espoused to Mr Black, cautioned him "against receiving or counting" the votes of certain persons to whom he objected, because they were disqualified *by the sett and constitution of the burgh*. Mr Bonthron repeated an objection of the same kind in May 1807. But, upon both of these occasions, the objections were disregarded, and Mr Black returned the Member chosen by the majority, and estimated this majority, by merely counting those who were upon the Council-books, and attended the meeting.

Argument for Mr Black.

On the other hand, it was argued for Mr Black, as follows.—

1. *This is a criminal action.* The commission of an *offence* is distinctly charged, and *punishment* inferring the loss of fortune, character, and

liberty, is demanded. This being the fact, it follows, that the defender is entitled to the benefit of all the liberal principles by which the law always presumes innocence, and makes it imperative on a prosecutor to bring distinct and direct proof of guilt. The complainer, therefore, must establish, 1*st*, That the statute applies unequivocally to this particular case; 2*dly*, That the commission made out by the defender, was given to a person who was not chosen by a majority of *lawful* voters; 3*dly*, That he himself was entitled to the commission, from his having been chosen by such a majority, not of pretended, but of real, electors; 4*thly*, And above all, in order to establish that there was any guilt in what was done, he must shew that there was a felonious, malicious, or criminal intent. But in every one of these points he has failed utterly.

2. It is a general rule in the law of election, throughout all Great Britain, that it is the duty of the returning officer to make the return *according to his honest judgment* of what is the majority of legal votes. This principle is at once so plain and rational, that it could never occur to any sound lawyer or reasonable man, that it required or admitted either of illustration or of proof. But since the pursuer has treated the doctrine as if it were new and monstrous, it is proper to observe, that though the rule has been modified in cases of this description by the election statutes, it has by no means been abolished. The preamble of the Act on which the complaint is founded, is, that returning

officers have of late behaved "in a most *partial and arbitrary manner*, sometimes upon *false* pretences, and sometimes *without any pretence at all.*" In order to prevent this *partiality*, a system of regulations is introduced to secure the return of those chosen by the majority of the persons, "who, by the constitution of the respective burghs, may *have votes* in the election," &c.; but there is hardly a single step of this duty that can be performed by the clerk, without a distinct and natural exercise of judgment. For example, the legal evidence of being delegate is the exhibition of a commission to that effect, bearing the common seal of the burgh. This seems to leave very little room for discussion. Yet two examples have occurred in this very district within this few years, in which the clerk was absolutely compelled to exercise his own judgment very materially. On one occasion, the clerk of Queensferry fraudulently put the seal of the burgh to two separate and opposite commissions; and on another occasion, two individuals appeared, and each produced a commission bearing a seal which was represented as the legal one. How could any clerk extricate these cases without an exercise of judgment? The defender was the clerk who was obliged to act when the doubtful seals were exhibited; and the present pursuer, in whose favour he decided, did not object *then* to his acting according to the evident justice or common sense of the case. Many other examples, such as that of stolen or forged seals, might easily be stated; but it is quite manifest, that if such serious difficulties

have arisen, when the only point was to ascertain *a palpable fact* of this description, a much more delicate exercise of judgment must be requisite where the legal qualifications of voters are to be decided.

It is no doubt said, that the clerk has nothing to do with their qualifications, and that he is merely to count those who are *assembled for the purpose* of electing, and that, at all events, the list of those who are chosen at the annual election forms the proper roll of the Council. But both of those are utterly fallacious, when stated as tests sufficient to exclude all independent exercise of intellect on the part of the clerk. The statute does *not* declare, that the electors are in every case to consist merely of those who were named Councillors at the annual election. On the contrary, it is certain, that in all burghs, and more especially in Inverkeithing, a person may *have been* qualified at the date of the annual election, and yet that he may become disqualified soon thereafter. He may cease to be an inhabitant, he may have become a lunatic, or a papist, or a peer, or an outlaw; or it may be discovered that a trick had been practised upon the annual meeting by a minor or a woman. In short, it is impossible to know who the legal voters are *merely by looking at the persons of those who happen to be assembled*, although it may be always right to begin the business as Mr Black did, by taking down a full sederunt. The question still recurs, who are the legal voters? And although the previous minutes of the Council may *assist* the

clerk in forming his judgment, they certainly do not controul him.

3. *Now, the sett of the burgh of Inverkeithing is very peculiar.* The authors of the statute evidently believed, that in every burgh there was an annual election of Councillors, and that the number of these Councillors was limited; and it is on this assumption that it is provided, that if a person objected to, be not complained of within two months *from the date of the annual election*, he shall continue a Councillor *till next year*. But there is not, and by the sett there cannot be, an annual election of the whole Inverkeithing *Councillors*, though it is no doubt true, but perfectly immaterial, that the *Magistrates*, who form a very small fragment of the Councillors, are annually chosen. Hence, it is impossible in this, as in other places, to deduce the title of a person claiming a vote from the mere fact of his having been named at a preceding annual election. Some of the twenty-two Common Councillors who were present on this occasion, were chosen ten, some fifteen, and some twenty years before Captain Montgomery was chosen in 1799, and Mr Gulland in 1806. And all of these might have been perfectly well qualified, though not one of them had been present at the annual election immediately preceding. On the other hand, though they had all been there, they might have afterwards lost their qualification, because *inter alia* residence is necessary for its *subsistence*.

The records of the burgh are full of examples in evidence of this last fact. In every one of the years

1760, 1772, 1774, 1791, the claims of persons who had unquestionably *been* Councillors, to vote, were disregarded, because they were not inhabitant *at the time*. Indeed, the practice could scarcely be otherwise, for the Court had twice determined that the qualification was lost *ipso facto* by non-residence. One of these cases is reported shortly perhaps, but perfectly distinctly by Elchies, and the other was determined by the Court in 1761, in the case of Haldane *against* Holburgh, when it was adjudged, that though it was necessary in a particular complaint to call *all* the Councillors, it was *not* necessary to call Captain Cunningham, because he, by not being in the burgh, had ceased to be a Councillor.

This being the fact, it is obvious that the Clerk of Inverkeithing can never do his duty at all, *unless* he exercise his judgment in ascertaining the fact of residence, and in giving this fact its legal effect. And it is in vain to compare his situation with that of clerks who acted at other burghs, at county elections, and the election of the Peers; for the clerk's business at all these meetings is prepared by the adjustment of a roll, which he has merely to call, whereas, unquestionably, there never was any roll of the subsisting Councillors of Inverkeithing, nor would it be decisive though there were.

The defender does not mean to insinuate, that the statute is not to be applied to the burgh of Inverkeithing. All that he maintains is, that it must be applied *rationally*, and that he was in one of those

situations described by Mr Wight, who says, (page 325.) that "*a judaical adherence to the letter of the statute* might appear inconsistent with that idea of justice which the Legislature must be supposed to have had in view;" that "penal laws ought to be expressed in the most unambiguous terms;" but that "this is not altogether the case with that clause of the Act of the 16th Geo. II. which is now under consideration, *in which questions have arisen attended with a good deal of nicety.*"

4. Now the difficulties arising out of the sett were greatly increased by the peculiarity of the circumstances in which the defender was called upon to form his opinion. For, 1*st*, *No offer was made by the complainer* to prove that Montgomery and Gulland had a residence within the burgh: 2*dly*, There was a judgment of the Court of Session standing, by which it was declared, in a case with Montgomery himself, that non-residence operated as a destruction, or at least abeyance, of the qualification: 3*dly*, The defender was required by *both* parties to exercise his own judgment in rejecting votes that were tendered on each side. These requisitions were urged upon him, who was but a provincial practitioner, by Counsel of high character, and General Campbell's Counsel were powerfully supported in this demand by the General himself. In this situation, it would not have been wonderful if any clerk whatever had been staggered with difficulties; but the fact is, that the course suggested to the defender by both parties, and ul-

timately pursued by him, was the one that always appeared to him to be right.

5. For he maintains, that he actually *did* give a commission to the person who had the majority of legal votes. The pursuer's sole ground of complaint is, that Montgomery and Gulland were rejected. But this is just an attempt to get votes to which he had no right, because these persons were rejected *justly*. They had lost their qualification by non-residence, and therefore *the pursuer has no title to prosecute* this action, because the statute makes the penalties exigible only by "*the person elected* Commissioner for the burgh." General Campbell was not so elected; and if his obtaining his seat for the district depended on what took place at Inverkeithing, he unquestionably would not have been the sitting Member.

6. At any rate, supposing that the defender made out the commission to a wrong person, still the *bona fides* with which he acted is sufficient to save him from the consequences of all penal complaint. Both the relevancy and the truth of this statement have been called in question, but there can be no rational doubt about either.

1. The *relevancy* of *bona fides* as a defence is implied both in the fact that this is a criminal prosecution, in all which cases it is the guilty mind that makes the guilty man; and in the fact, that the defender was absolutely obliged to decide the matter one way or other; because a *necessity* of judging implies the power of judging, and this power carries along with it the quality, that it can-

not be exercised penally if it be exercised honestly. Accordingly, in the recent case from the burgh of Culross, (November 26. 1812.) it was held sufficient to save a party from the penalties, that in separating from the majority, and making a double election, which is a statutory offence, they had acted *bona fide*. No judgment in opposition to this can be stated. The cases of Gordon in 1768, and of Murray, the Town-clerk of Queensferry, referred to by the complainer, were not cases in which the plea of *bona fides* was repelled as irrelevant. It was only found inapplicable, as these were proceedings in which there was no *bona fides* in point of fact.

2. As to the *reality* of the defender's *bona fides*, no sensible or honourable man can doubt it. It is preposterously attempted to silence him on this subject, by saying, that his true opinion must be held to have been formed the other way, because in 1806 he refused to reject votes when he was moved by a Mr Bonthron to do so. But his plea is, not that he is *always* obliged to sustain objections, but that it is his duty to do so *sometimes*, *i. e.* when they are well-founded, and when his decision upon them is *necessary*, which in those cases it was not, as there was a decided majority independently of the persons Bonthron objected to. He would not comply with Mr Bonthron's request in 1806, because he held it not to be justified by the circumstances; but is that a reason why he should have admitted the votes of Messrs Montgomery and Gulland in 1812?

On this last occasion, he was required by *both* parties to disallow the votes of all those who were non-resident; there was actually a judgment of the Court rejecting one of the persons (Montgomery) claiming to vote; it was notorious, *and proved*, that the two who were rejected were not inhabitants; and, on the propriety of exercising his judgment, and of exercising it in the way that he did, the defender had a decided opinion from the most eminent lawyer, on these subjects, in the kingdom. That the judgment in Montgomery's case had been petitioned against was obviously of no consequence, because still it was a judgment till it was altered; and above all, *it shewed the principle*, that non-residence was an *ipso facto* disqualification. Both he and Gulland had, no doubt, attended subsequent meetings, chiefly of the ordinary Council, when the clerk has no statutory duties to perform, and is merely the servant of the meeting; and at the meeting, or meetings, for chusing a delegate, at which they were present, the majority was so great, that the clerk's conduct could not have depended on the reception or rejection of their votes. But at any rate, they might have lost their qualification by non-residence, *after* the last of these meetings; and the previous decision was chiefly relied upon, as shewing the legal consequence of this fact. The opinion of Mr Adam is objected to, because he was an English lawyer. But this is utterly frivolous, as it is well known that he was a *parliamentary* lawyer, particularly in Scotch cases. It is also said, that the case laid before this gentleman was defec-

tive, in so far as it did not state that Montgomery and Gulland had voted at meetings after the date of the foresaid judgment. But, in the *first* place, this fact was perfectly immaterial; and, in the *second* place, it was as plainly stated as any thing else was. It is distinctly set forth by General Campbell in the minutes, and the *whole* of these minutes were referred to in the *Case*, and laid before Mr Adam.

7. At all events, whatever there may be in the pleas maintained by the complainer, either of justice or of law, he is barred, *personali exceptione*, from stating them; because if the defender acted irregularly, he was induced to do so by General Campbell himself. *He* urged Mr Black, as the minutes shew, to exercise his judgment in shaking off non-residenters, and yet he pretends to prosecute the person to whom he used those solicitations, for following the advice which he gave.

OPINIONS OF THE JUDGES OF THE COURT OF SESSION. *January* 15. 1814.

The Judges of the Second Division of the Court of Session, before whom this case came, were unanimous against Mr Black. It is not necessary to enter into any *detail* of the opinions expressed by their Lordships, because, in general, their views were the same with those adopted by the pursuer.

LORD ROBERTSON said, 1*st*, That he did not think that the Clerk was entitled to exercise any

discretion, but was bound merely to look at the roll of Councillors; and that this roll, though there had been a good deal of doubt about the use of the word, was obviously the list, by whatever term it might be called, which contained the names of all the Councillors who were admitted, and had not been turned off: *2dly*, That admitting that the Clerk was entitled to judge, he was at least bound to do so *bona fide;* that he was not perfectly satisfied with his *bona fides;* but that, at all events, this was a case in which a clear rule of law being laid down, *bona fides* was out of the question.

Lord Pitmilly concurred in the same opinion, and added, 1*st*, That the personal objection stated against General Campbell did not apply, because it was not alleged that his having moved the Clerk to exercise his judgment *misled* that officer; on the contrary, it was distinctly stated that he was not misled, but acted properly: *2dly*, That he "thought *the language of the complaint unwarrantable and unjustifiable, and the general reflections thrown out against Mr Black totally groundless;* and that he was not restrained (but rather the reverse) from stating this, by seeing his own name, as one of the Counsel, at the end of the paper."*

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* We have heard the intemperance of the complaint defended, because one of the names attached to it was "David Monypenny," (Lord Pitmilly). There is nothing in professional practice which this name would not justify; but it is very well known, that when a paper is signed by a plurality of Counsel,

Lord Bannatyne concurred in thinking that the law had deprived the Clerk of all discretion, and that he was bound absolutely to grant the commission to the individual elected even by the apparent majority, or, in other words, those who formed the majority *de facto*, though not *de jure*; and that the only remedy for the illegal elections to which this might lead, was by a complaint to the Court of Session. The personal exception against the complainer, he thought was sufficiently removed by the fact, that it was the other party who *began* asking the Clerk to exercise his judgment, and that General Campbell only said, "if this is to be done, let it be done fairly." His Lordship added, however, "*I have no favour for this Complaint, which is a resentful measure that I cannot respect,*" especially since the constitution of the burgh was peculiar, and strongly "calculated to produce questions and difficulties."

Lord Justice-Clerk (Boyle) *regretted* that he could not help thinking the complaint completely well founded. But upon the whole, he was satisfied, 1*st*, That the personal objection was barred by the fact that General Campbell did not take

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the rest frequently subscribe upon the faith of the author, without actually reading every word of it themselves. At all events, this declaration by his Lordship from the Bench completely saves Mr Black from the imputation which would otherwise appear to be cast upon him, if his Lordship's professional signature had stood without his judicial explanation.

the lead, but only followed in moving the Clerk to exercise his discretion; *2dly*, That the statutes had, by a series of progressive advances in strictness, at last excluded all discretion whatever, and that the officer was bound to decide according to the majority *de facto*, leaving either party to get redress, if any thing wrong was done, by summary complaint to the Court; *3dly*, That the fact, that Montgomery and Gulland had voted at a number of meetings after the date of the judgment of the Court in 1807, ought to have satisfied Mr Black that they had a title sufficient to justify him for receiving their votes; and that if this fact had been stated to Mr Adam, the opinion of that learned person (who, however, was not a Scotch lawyer,) would probably have been different.

Lord Meadowbank was aware that by the general policy of criminal law, penalties could not be inflicted without criminal intent; but he held this case to be peculiar, 1*st*, Because the matter was entirely regulated by statute, and the Acts had virtually declared, in conformity with a general rule, that this officer, who acted only ministerially, was bound to follow, without deviation, a very plain course that was prescribed to him; *2dly*, Because, to incur the penalties, *absolute criminality* of intent is not required. His Lordship differed entirely from the doctrine of Mr Adam, "a doctrine which I must call monstrous, as applied to the law of Scotland." He stated, however, on both occasions on which his Lordship had an opportunity of deli-

vering his opinion, that this was a severe case, and "*I wish the prosecutor did not insist for the imprisonment and disabilities.*"

Lord Glenlee concurred in the opinions that had been delivered. It appeared to him that the whole of the legal argument of Mr Black resolved into this,—that it was inexpedient in the Legislature not to except Inverkeithing, on account of its peculiar constitution, from the Act. But still the statute did apply unsparingly to every burgh in Scotland; and Parliament might have thought, and with reason, that the safest course upon the whole to adopt, was to entrust the power of electing to those who were at any time in possession of the elective *status*, whether they held it lawfully or not.

The first interlocutor pronounced (dated 22d, signed 25th May 1818.) was in these terms: "The Lords having advised this petition, with the answers, replies, and duplies, and writs produced and referred to, sustain the complaint: Find that the respondent, David Black, has forfeited the sum of L.500 Sterling, and decern against him for payment thereof to the complainer: Order the said David Black to be imprisoned for the space of six kalendar months, and declare him for ever disabled to hold or enjoy the office of Common-Clerk of the Burgh of Inverkeithing, as effectually as if he was naturally dead: Find him liable in the expenses of this complaint; allow an account thereof to be

given in, and remit to the auditor to tax the same and report."

This judgment was afterwards (Jan. 15. 1814.) adhered to *simpliciter*, on advising a petition with answers.

At this period Parliament was not sitting; so that it was impossible for Mr Black to prevent the instant execution of the sentence, by entering an appeal. The Lord Justice-Clerk adverting to this circumstance, wished to know whether General Campbell intended immediately to carry the judgment into effect? To this it was answered by one of his Counsel, "that they *had no instructions to say he would not, and that he was entitled to exercise his own discretion.*" Upon this his Lordship submitted to the Court the propriety of delaying signing the interlocutor till the Parliament had met, else the defender might be imprisoned, and the judgment after all reversed. The competency of this was doubted; but Lord Glenlee, after stating that the situation of Mr Black was distressing, observed that the judgment did not mention any place of confinement; so that it could not be carried into effect without a petition, which, when it was given in, might be delayed or refused. This being discovered, it was *then* stated for the complainer, "that he had no desire to entrap the Court, and *that that part of the sentence which related to imprisonment* might be delayed." The Lord Justice-Clerk stated, that this put an end to the difficulty. But Mr Clerk, as Counsel for the defender, pointed out, 1*st*, That there was no *place* of confinement men-

tioned; *2dly*, No *time*; *3dly*, That there was no *warrant* for imprisonment; *4thly*, That the account of *expenses* remained to be modified; *5thly*, That the interlocutor wanted the essential word "*decern.*"

The result was, that the judgment stood as originally pronounced, and Mr Black was saved from *imprisonment* pending the appeal, which he entered as soon as he could. But he was *not* saved from all the other penal consequences of the judgment. He was obliged to pay the fine of L.500, though he got (what was almost unnecessary) an obligation that it would be repaid in the event of a reversal. *The pursuer, moreover, gave in a petition, in which he prayed the Court to enforce the disability from acting as clerk during the dependence of the appeal.* This application, however, was refused with expenses. (11th June 1814.)

Proceedings in the House of Lords.

The appeal was not heard till the month of May 1817, when the Lord Chancellor was decidedly of opinion that the sentence ought to be reversed. In the course of Sir Samuel Romilly's argument, who was Counsel for the appellant, his Lordship stated, that "*he could not have supposed it possible that such a Complaint could have been found in the records of any Court of Justice in the world. If the proceedings had been in this country, the first step would have been to refer it to the Master for scandal*

and impertinence."* When one of the Counsel for the respondent was looking, in the course of his speech, for something of which his Lordship wished to know if it were in the Complaint, and it not being found, he said, "*that he did not wonder that he (the Counsel) could not easily find what should have been averred, in a paper which contained so much that ought not.*"

After the pleadings were over, his Lordship said, "I should be unwilling to give judgment in this case, without giving the respondent every opportunity to explain the matter. *I think this one of the hardest cases I ever saw*, and we are bound to attend strictly to the question, whether they are right in the averment and proof; AND, AS FAR AS CHARACTER GOES, I THINK THE APPELLANT IS MUCH THE WORST USED GENTLEMAN OF THE TWO."

In afterwards delivering his judgment, (May 16. 1817.) his Lordship began by stating, at considerable length, the exact provisions of the statute,—the averments and conclusions of the complaint,—and the proceedings in the Court below. He then said, that he thought it impossible not to regret, that notwithstanding all the precision of the Act, it gave no definite direction to the Clerk of such a body as the burgh of Inverkeithing. "My Lords," said he, "in an Act so dreadfully penal as this, I trust I do not go too far when I say, that in no part

* *Impertinence*, in English law, we understand, means *not pertinent*. In what sense the Lord Chancellor used it we cannot say.

of this kingdom can one permit men to be prosecuted *upon loose pretences, and on proceedings and proofs which do not contain in averment the essence of the crime with which an individual is charged.*

"My Lords, I now proceed to state to your Lordships *the summons* in this case, which I profess to you *I cannot read without pain. My Lords, I am sure that in this part of the kingdom, no Court would permit such matter as I am now about to state to stand part of their records;* and I state this with the less difficulty, because your Lordships have been informed that it was to the surprise of those concerned that such matter was introduced. My Lords, if this Act of Parliament shuts out altogether the question of *bona fides* of the Clerk of the town, and if it does, what I do not mean to deny or assert that it does, make it competent upon him, whatever his judgment may be with respect to the qualification from which a man is to derive the character of Magistrate or Councillor of the town, to return, without exercising that judgment, according to the majority of those who *actually have* that character, whether they *ought* to have it or not: if that be the meaning of the Act, surely, my Lords, it would be enough to have averred in those proceedings, which aimed at nothing less than charging a man to the amount of L.500, charging him with an offence for which he was to be imprisoned for six months, charging him with an offence which was to consign his name to infamy, and charging him with an offence which made him liable to an indictment for perjury,—*temperately*

and soberly to have averred, that there were such persons present at the meeting convened for the purpose, that he did not return according to the majority; and therefore praying that the consequences of the law, which left him no discretion, might attach upon him; and one should have thought, that in drawing up a proceeding *against a man, who really, if he was mistaken, seems to have been misled by some very common mistake among all who were present at the time, certainly amongst the principal persons* who were present at the time; *one should have thought that there would have been a feeling which would at least have made the statement which was to lead to such consequences as moderate and as temperate as the necessity of the case would allow.*" His Lordship here read the passages of the Complaint that have been already quoted, besides several others. When he came to that part which begins, "In order that your Lordships may be fully able to appreciate the *motives*," the Lord Chancellor observed,—"Your Lordships will take notice, that this is a proceeding in which the person proceeding *has been urging all along that the motives are not matter of judicial consideration.*" This remark was repeated as to various other passages of the complaint; after which his Lordship commented upon the different circumstances which had been insisted upon by the parties.

On the subject of the *personal objection* which had been urged against the complainer, and to which no answer had been given in the Court be-

low, except that the complainer only moved the Clerk to exercise his discretion, *after the other party had done so*, his Lordship said, " Now really, my Lords, if you are to have a bar *personali exceptione*, let it be remembered that it is not with *the other party* who is objecting that this is *personalis exceptio*, but it is the *Clerk* who is objecting that it is *personalis exceptio*. What does it signify to him which is the first person who *begins* to mislead him? General Campbell, with great propriety and good sense, might say, if this man is to be influenced by objections, I will make other objections of the same kind; but General Campbell should not have done so without avowing to the Clerk what his reasons for doing it were. If he had said, I call upon you to pay no attention whatever to these objections; but if you are determined to pay attention to them on one side, I call upon you to pay attention to them on the other side, giving you at the same time notice, that you ought to pay no attention to these objections on either side,—that would have relieved him from this objection. But if General Campbell has thought proper himself to make objections, because the other side did so, and not fully to explain why he made them, surely *he concurs to a certain extent in misleading the Clerk of the Town.*"

With respect to *Mr Black's politics, and his consultation of Mr Adam*, his Lordship observed, " It is quite immaterial, in my view of it, whether Mr Black is a political enemy to one party or the other,

or whether there are no politics in the case. The single question is, Whether he has offended? It appears that Mr Black afterwards, for his own justification, took the opinion of a gentleman whom we have all long known, a gentleman of the name of Adam, who has had a great deal of practice, at least in the law of Scotland, at this Bar. Now this Mr Adam, having had a great deal of practice at your Lordships' Bar in Scotch causes, and having had a great deal of experience before Committees of the House of Commons in matters of Scotch elections, Mr Black seems to think him a very proper person to resort to for advice."

After pointing out various other circumstances as indicating the purity of the defender's conduct, his Lordship stated the result to be, that he had "taken the best means to understand this question, not only by reading the cases, but also the better information that I could receive from those who had before read them;" and that "I must act upon my own judgment. I am as much bound to act upon my own judgment, as I am to exercise no judgment upon that which was before another; *but I cannot think the circumstance, as it is here stated, of Mr Black taking down the names of the individuals who happened to be in the room, and putting those names down in the minutes of sederunt, aye, and administering the oath too, is evidence which ought to convict him in those penal proceedings.*"

His Lordship, in illustration of the numerous objections to which the judgment *might* be exposed,

said, that " there is another difficulty in this case, —which I do not mean to state as a difficulty on which I should propose to your Lordships to act,—but a difficulty to which at this moment I am unable to give an answer; and that is, that whatever may be the case as to a judgment of imprisonment *only*, I have a very considerable doubt whether the Scots practice of applying again to the Court of Session to get sentences enforced, will account for a judgment which inflicts immediate disability and fine, *and postpones to future applications so much* of the judgment as relates to imprisonment. *I think it a very difficult thing to make that out.*"

These matters, however, he said, were not necessary to be gone into for the decision of the case, because, even if the appellant had behaved improperly, he ought not to have been convicted *under this complaint.* The radical allegation of the complainer was, and must be, that the Clerk, (in the words of the complaint,) " was bound to have known the limits of his own duty, and to act accordingly."—" Now, granting them," said his Lordship, " that principle, I say it is incumbent on General Campbell, in prosecuting this suit, to shew that *he* was *duly* elected a Commissioner." His Lordship then explained, that there was not even an accurate averment upon this subject in the complaint, and that, therefore, " for want of sufficient allegation, and particularly for want of sufficient proof, that General Campbell was duly elect-

ed Commissioner; which resolves itself into another proposition, that for want of proof that these persons were upon the record of the town, this judgment cannot be sustained, and that therefore the defender ought to be assoilzied."

Lord Redesdale said, that he concurred in all that had fallen from the noble and learned Lord. "I have looked through the proceedings here, and I can find no allegation, *and nothing resembling indeed an allegation*, that General Campbell was duly elected. There is none such in the proceedings." His Lordship expressed great doubts, if the statute, which, by referring to the constitutions of the different burghs, must have been meant to be construed consistently with them, could be applied rigidly to a burgh of so peculiar a constitution as Inverkeithing. But, however this might be, "the statute giving no line by which the person who was to make the return is to ascertain who are the Magistrates and Town-Council, it seems to me that the strictness of the former part of the statute does not apply to this part of the case; and, therefore, if the fact be true, that the constitution of the burgh of Inverkeithing is that which is stated upon the record, on the part of the appellant, *it is perfectly clear that the appellant did what he was entitled to do.*"

May 16. 1817.

The judgment was, "that the interlocutors complained of in the said appeal be, and the same

are hereby reversed, and that the defender be assoilzied."

Though the precise point on which this complete reversal was *technically put*, was, that there was no allegation or proof that the complainer had a title to pursue, yet it is clear, from the speeches of the two noble and learned Judges who delivered their sentiments in the House of Lords, that they were satisfied, 1*st*, That, however difficult it might be to establish the fact in any specific case, a difficulty which it was the policy of the law to increase,—nevertheless, *bona fides* was a relevant ground of defence; 2*dly*, That none of the circumstances relied upon by the complainer as evidence of the *mala fides* of Mr Black, justified that conclusion,—whether they were taken separately or jointly; 3*dly*, That even admitting the complaint to have been well founded, both in fact and in law, there was no apology for the style in which it had been preferred and insisted on; and, of course, that the impropriety of its tone was infinitely deepened by its proceeding from a person, who not only tried to mislead the Clerk himself, but had all the while no right whatever to complain.

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THE END.

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